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NOTES

Constitutional Law: Can the President of the United States Force His Military Advisers to Testify When They Wish to Claim Their Privilege Against Self-Incrimination?

On February 12, 1987, President Reagan announced he would not order Admiral John Poindexter or Lieutenant Colonel Oliver North to testify in the Iran-Contra hearings without immunity. This announcement raises the question of whether President Reagan, acting as Commander-in-Chief of the United States Armed Forces, could have lawfully forced Admiral Poindexter and Lieutenant Colonel North to testify before congressional committees without statutory immunity from criminal prosecution. The answer to this question will certainly not affect the results of the Iran-Contra investigation; however, the principles inherent in this issue are equally applicable to any future situations in which presidential military advisers are asked to testify about their duties. Therefore, the analysis will proceed from a general point of view, focusing not on the identities of the current President or current military advisers but on the relationship between a President and his military advisers.

It is not the purpose of this note to determine the effects of an adviser's decision to testify out of loyalty to, or other personal feelings for, the President. Such a decision would appear to be a personal choice of the adviser, made freely, and should therefore constitute a waiver of the privilege against self-incrimination. This note instead considers the possibility of a President ordering his military advisers to testify and threatening them with punitive action, such as removal from office or loss of military rank and benefits, if they refuse. Thus, the issue becomes whether the President can lawfully use threats of punitive action to force his military advisers to testify without statutory immunity.

A presidential military adviser who is ordered to testify without statutory immunity and threatened with punitive action if he refuses will have a choice: he can either testify and claim protection from the use of his testimony against him, or he can refuse to testify and claim protection from the threatened punitive action. The remedies available to the adviser in each situation will determine the constitutionality of the presidential order.

Although these claims are grounded in the fifth amendment privilege to avoid self-incrimination, several factors distinguish them from ordinary fifth amendment claims. First, the President's military advisers are officers in the

United States Armed Forces.¹ When acting as Commander-in-Chief, the President is their military commander.² The authority and discipline inherent in the military relationship between commander and subordinate may give the President the latitude to force his military subordinates to testify without statutory immunity.

However, while the President's military advisers are military officers, they occupy positions that are essentially political in nature.³ The political nature of the positions may lead the President's military advisers to be treated as political appointees, rather than military officers, so that the President's military authority no longer reaches them; in that case the President may not have the power to coerce their testimony. Alternatively, the political nature of the positions may have the opposite effect, giving the President the latitude to make continued political employment contingent upon prompt and truthful testimony.

Because these factors are so peculiar to the relationship between the President and his military advisers, authority on the issue is nonexistent. However, the fifth amendment protection available to military advisers should be discernible by analogy to similar fifth amendment claims raised by civilians. Thus, this note will first examine the scope of the fifth amendment privilege to avoid self-incrimination in a civilian context to determine the limits placed on the use of threats to coerce self-incrimination.

Second, this note will determine whether the characteristics that distinguish military from civilian society warrant a more limited fifth amendment privilege for military personnel than that which exists for civilians. Courts use the doctrine of justiciability to distinguish constitutional claims by military personnel from similar claims by civilians. Thus, the justiciability of constitutional claims raised by military personnel will be examined. The principles defining the justiciability of military constitutional claims will then be applied to the assertion of the privilege against self-incrimination by military personnel. This analysis should determine whether claims for protection from self-incrimination, found to be within the scope of fifth amendment protection offered to civilians, will be offered by the courts to military personnel as well.

Fifth Amendment Privilege Against Self-Incrimination

The fifth amendment provides that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself."⁴ This constitutional provision gives every individual the privilege to avoid self-incrimination without penalty. The Supreme Court has strictly protected the right to exercise this

1. Admiral Poindexter is a naval officer and Lieutenant Colonel North is a Marine Corps officer.

2. U.S. CONST. art. II, § 2, cl. 1, provides that: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."

3. Admiral Poindexter was the Chief of the National Security Council. Lieutenant Colonel North was the Deputy Director for Political-Military Affairs in the National Security Council.

4. U.S. CONST. amend. V.

privilege free from coercion; however, because the Court's protection is necessarily remedial in nature, Supreme Court protection against coercion must be examined in two situations. First, how does the Supreme Court protect a person's privilege to avoid self-incrimination where that person has been coerced into incriminating himself? Second, how does the Supreme Court protect a person's privilege to avoid self-incrimination where that person has invoked the privilege and, as a result, been subjected to punitive action?

The first situation is addressed in *Garrity v. New Jersey*.⁵ Several police officers were suspected of fixing traffic tickets and were questioned during a state Attorney General investigation. Prior to questioning, each officer was told that: (1) anything he said could be used against him in a state criminal case; (2) he could refuse to answer if he believed his answers could incriminate him; and (3) he could be removed from office pursuant to a state statute if he refused to answer.⁶ The officers answered the questions and the answers were used to convict them of fixing traffic tickets. After the convictions were upheld on appeal to the New Jersey Supreme Court, the United States Supreme Court granted certiorari.

The Court found the police officers were presented with an unconstitutional Hobson's choice prior to questioning⁷:

The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. That practice, like interrogation practices we reviewed in *Miranda v. Arizona*, is "likely to exert such pressure upon an individual as to disable him from making a free and rational choice." We think the statements were

5. 385 U.S. 493 (1967).

6. N.J. REV. STAT. § 2A:81-17.1 (Supp. 1965) provided that:

Any person holding or who has held any elective or appointive public office, position or employment (whether state, county or municipal), *who refuses to testify* upon matters relating to the office, position or employment in any criminal proceeding wherein he is a defendant or is called as a witness on behalf of the prosecution, *upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself or refuses to waive immunity* when called by a grand jury to testify thereon or who willfully refuses or fails to appear before any court, commission or body of this state which has the right to inquire under oath upon matters relating to the office, position or employment of such person *or who, having been sworn, refuses to testify or to answer any material question upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself*, shall, if holding elective or public office, position or employment, be removed therefrom or shall thereby forfeit his office, position or employment and any vested or future right of tenure or pension granted to him by any law of this state provided the inquiry relates to a matter which occurred or arose within the preceding five years. Any person so forfeiting his office, position or employment shall not thereafter be eligible for election or appointment to any public office, position or employment in this state.

Garrity, 385 U.S. at 494 n.1 (emphasis added).

7. *Garrity*, 385 U.S. at 496.

infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions.⁸

The state argued that the police officers were given a choice between speaking or not speaking and voluntarily chose to speak. Therefore, the state claimed the officers waived their right to avoid self-incrimination.

The Court rejected this argument because it would allow the state to force everyone to speak.⁹ When questioned, a suspect always has a choice between speaking and not speaking; but the suspect is faced with the possibility of criminal liability if he speaks. If the state's reasoning were accepted, authorities could present every suspect with a harsher penalty for not speaking than the possible criminal penalty he might receive for speaking.¹⁰ Faced with such a choice, every suspect would choose to speak because it would always be in his best interest to choose the lesser of the two penalties. The state could then claim every suspect freely chose to speak and voluntarily waived the privilege to avoid self-incrimination.¹¹

The Court found such a result impermissible; that a choice is made according to self-interest is the essence of duress, not free choice.¹² Therefore, the Court held the privilege to avoid self-incrimination, and the corresponding protection against coerced statements, prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office.¹³ Such protection extends to all individuals.¹⁴

The protection provided by *Garrity* is, in essence, a form of constructive immunity.¹⁵ This constructive immunity stems not from the employer, the judiciary, or the state or federal government, but from the fifth amendment protection against self-incrimination. Thus, when a public employee is asked to testify about matters that may subject him to criminal prosecution, the process may be viewed as a two-step process. In the absence of statutory immunity granted by the government or other prosecuting authority, a public

8. *Id.* at 497-98 (citation omitted).

9. *Id.* at 493.

10. *Id.* (citing *Union Pac. R.R. v. Public Serv. Comm'n*, 248 U.S. 67, 69-70 (1918)).

11. *Id.* at 493.

12. *Id.*

13. *Id.* at 500.

14. *Id.*

15. The *Garrity* decision found a form of "constructive immunity" in the fifth amendment that protects against coerced self-incrimination. *Id.* at 500. Because it arises from the fifth amendment, this immunity would presumably extend no further than the minimum immunity necessary to fully protect the privilege against self-incrimination. The minimum immunity necessary to protect the fifth amendment privilege is use-restriction immunity. See *United States v. Apfelbaum*, 445 U.S. 115, 123 (1980) (Court recognized that immunity statute was designed by Congress to be as broad as, but no broader than, the fifth amendment privilege against self-incrimination, which is reflected by the use-restriction immunity concept); *In re Daley*, 549 F.2d 469, 477 n.8 (7th Cir. 1977) (court recognized that the use-restriction immunity concept reflects the minimum scope of immunity that is constitutionally required), *cert. denied*, 434 U.S. 829 (1980). Thus, the constructive immunity provided by the fifth amendment through *Garrity* should equal use-restriction immunity.

employee may refuse to testify and claim the fifth amendment privilege to avoid self-incrimination. If the government then obtains the employee's testimony by threatening him with dismissal, the fifth amendment provides the employee with constructive immunity: his testimony cannot be used against him. If the government tries to use the employee's testimony against him in a later criminal action, the employee has a judicial remedy.

The protection available when a person has refused to testify and has been penalized for invoking the privilege to avoid self-incrimination is illustrated in *Spevack v. Klein*.¹⁶ In *Spevack* an attorney was disbarred because he invoked his privilege to avoid self-incrimination and refused to testify in a judicial proceeding. After the Court of Appeals of New York affirmed his disbarment, the United States Supreme Court granted certiorari. As in *Garrity*, the Court refused to allow any penalty to attend an individual's assertion of the privilege to avoid self-incrimination.¹⁷

In this context "penalty" is not restricted to fine or imprisonment. It means. . . the imposition of any sanction which makes assertion of the Fifth Amendment privilege "costly."

The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege. That threat is indeed as powerful an instrument of compulsion as "the use of legal process to force from the lips of the accused individual the evidence necessary to convict him. . . ." We find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others. Lawyers are not excepted from the words "No person . . . shall be compelled in any criminal case to be a witness against himself"; and we can imply no exception.¹⁸

Thus, the Court reversed the lawyer's disbarment.¹⁹

Justice White, however, raised a point in dissent that bears on the constitutionality of attempts to coerce testimony from public employees. Justice White argued that governments should be allowed to use threats of discharge to compel public employees to testify and should be allowed to discharge those who

16. 385 U.S. 511 (1967).

17. *Id.* at 514.

18. *Id.* at 515-16.

19. *Id.* at 519. See also *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) (statute held unconstitutional which divested attorney of his state political party offices when, in response to a subpoena, he asserted privilege to avoid self-incrimination and refused to waive immunity from criminal prosecution); *Lefkowitz v. Turley*, 414 U.S. 70 (1973) (statute held unconstitutional which required all public contracts to include a provision that, if a contractor was called to testify about his contracts with the state and refused to testify or waive immunity, all of his contracts with the state would be canceled and he would be prevented from contracting with the state for five years); *Gardner v. Broderick*, 392 U.S. 273 (1968) (statute held unconstitutional which caused police officer to be dismissed when he asserted privilege to avoid self-incrimination and refused to testify before grand jury and waive immunity from criminal prosecution).

refuse.²⁰ *Garrity* firmly established that the fifth amendment fully protects the privilege to avoid self-incrimination by prohibiting the use, in any subsequent criminal action, of testimony gained through threats of loss of employment.²¹ Thus, Justice White argued that no violation of the privilege against self-incrimination can occur where a government threatens loss of employment to coerce testimony by its employees—an employee cannot incriminate himself because his testimony cannot be used in any subsequent criminal action.²²

This argument was explored in *Gardner v. Broderick*²³ and *Uniformed Sanitation Men Association v. Commissioner of Sanitation*.²⁴ In *Gardner* a policeman was called before a grand jury that was investigating bribery and corruption of police officers. He was advised of his privilege against self-incrimination but was asked to sign a waiver of immunity and told he would be fired if he refused to sign. He refused to sign the waiver and was fired pursuant to a city ordinance.²⁵

The city attempted to distinguish *Gardner* from *Spevack* on the basis that the duties of a public official, such as a policeman, differ from the duties of the attorney in *Spevack*. Unlike an attorney, who is responsible to his client, a police officer owes his entire loyalty and allegiance to the citizens of the city or state that employs him. Accordingly, the city claimed an interest in forcing the officer to account for his actions. The Court recognized this distinction:

We agree that these factors differentiate the situations. If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, *without being required to waive his immunity* with respect to the use of his answers or the fruits thereof in a criminal prose-

20. *Spevack*, 385 U.S. at 532 (White, J., dissenting).

21. *Id.* at 531 (White, J., dissenting).

22. *Id.*

23. 392 U.S. 273 (1968).

24. 392 U.S. 280 (1968).

25. Section 1123 of the New York City Charter provided that:

If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall *refuse to testify or to answer any question* regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, *on the ground that his answer would tend to incriminate him*, or shall *refuse to waive immunity from prosecution* on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency.

Gardner, 392 U.S. at 275 n.3 (emphasis added).

cution of himself, the privilege against self-incrimination would not have been a bar to his dismissal.

The facts of this case, however, do not present this issue. . . . [Petitioner] was discharged from office, not for failure to answer relevant questions about his official duties, but for refusal to waive a constitutional right. He was dismissed for failure to relinquish the protections of the privilege against self-incrimination. . . . *He was dismissed solely for his refusal to waive the immunity to which he is entitled if he is required to testify despite his constitutional privilege.*²⁶

Thus, the Court found that the policeman had to be reinstated but expressly based its decision on the fact that the employee was discharged for failing to waive the constructive immunity provided by the fifth amendment through *Garrity*.²⁷

In *Sanitation Men* the Court considered a claim for reinstatement by a group of city employees who were discharged when they refused to waive immunity. Again, the Court noted the difference between a discharge based on a refusal to answer questions and a discharge based on a refusal to waive immunity:

Petitioners were not discharged merely for refusal to account for their conduct as employees of the city. *They were dismissed for invoking and refusing to waive their constitutional right against self-incrimination.* They were discharged for refusal to expose themselves to criminal prosecution based on testimony which they would give under compulsion, despite their constitutional privilege.

. . .

As we stated in *Gardner v. Broderick*, if New York had demanded that petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment *without requiring relinquishment of the benefits of the constitutional privilege*, and if they had refused to do so, this case would be entirely different. In such a case, the employee's right to immunity as a result of his compelled testimony would not be at stake.²⁸

The Court ordered the petitioners reinstated because their dismissal was premised on a refusal to waive the constructive immunity provided by *Garrity*.²⁹

The strong dicta in these two cases indicates that a public employer may use threats of dismissal to force a public employee to answer questions specifically, directly, and narrowly relating to the performance of his official duties, so long as the employer does not attempt to coerce the employee into

26. *Id.* at 278 (emphasis added).

27. *Id.* at 279.

28. *Sanitation Men*, 392 U.S. at 283-84 (emphasis added).

29. *Id.* at 285.

waiving his fifth amendment rights. If the employee refuses to respond, he may be dismissed. Such punitive action will not violate the employee's privilege against self-incrimination because the employee could not have incriminated himself by answering the questions. The threat of dismissal provides the employee with constructive immunity under *Garrity*; his testimony under threat of dismissal cannot be used against him in a later criminal action. Thus, the employee's fifth amendment privilege remains protected.

The argument that *Garrity*'s protection against self-incrimination should allow a government to force its employees to testify is analogous to situations where a suspect has been given statutory immunity by a prosecuting authority. Statutory immunity prevents a suspect from incriminating himself. By dissolving the opportunity for self-incrimination, the statutory immunity in effect replaces the suspect's fifth amendment privilege.³⁰ The suspect must then testify and can be found in contempt if he refuses to do so.³¹ The prosecuting authority can also use the suspect's testimony in later perjury proceedings if the suspect lies.³² The Supreme Court's dicta in *Gardner* and *Sanitation Men* suggests that the constructive immunity provided by *Garrity*, like statutory immunity, replaces the fifth amendment privilege when a public employee is threatened with dismissal for refusing to testify.

However, a public employee's privilege to avoid self-incrimination is violated

30. *In re Dalky*, 549 F.2d 469, 478 (7th Cir.), cert. denied, 434 U.S. 829 (1977). A suspect may argue that neither statutory immunity nor the constructive immunity provided by *Garrity* can entirely replace the fifth amendment privilege against self-incrimination because the suspect's testimony may subject him to adverse consequences he would not suffer were he not forced to testify. For example, immunity may not prevent the use of testimony in a later civil suit, and it may not prevent a prosecution for perjury if the testimony is false. Testifying with immunity may also subject the suspect to loss of employment or loss of reputation.

The United States Supreme Court addressed this reasoning in *United States v. Apfelbaum*, 445 U.S. 115 (1980), where it considered whether truthful statements made by a suspect after statutory immunity was granted could be used against the suspect in a later perjury prosecution. The Court concluded that the scope of protection offered by the privilege is not defined by the benefits one might gain by remaining silent. "For a grant of immunity to provide protection 'coextensive' with that of the Fifth Amendment, it need not treat the witness as if he had remained silent." *Id.* at 124-27. The Court thus allowed truthful statements to be used against the suspect in the perjury prosecution, along with the allegedly false statements. *Id.* at 127.

The Court's reasoning should apply as well to public employees protected from self-incrimination by *Garrity*'s constructive immunity as to suspects protected by statutory immunity. Thus, where a public employee is protected by *Garrity* from self-incrimination, the fact that the employee's testimony may place him in a worse position than if he had not testified should not prevent the government from using threats of punitive action to coerce the employee's testimony.

31. *United States v. Hockenberry*, 474 F.2d 247, 249 (3d Cir. 1973) ("Congress had authorized and the courts have sanctioned judicial compulsion of otherwise self-incriminating testimony so long as full protection is given the witness against injury through future incriminating use of the compelled statement.").

32. *Apfelbaum*, 445 U.S. at 126 ("All of the Courts of Appeals, however, have recognized that the provision in 18 U.S.C. § 6002 allowing prosecutions for perjury in answering questions following a grant of immunity does not violate the Fifth Amendment privilege against compulsory self-incrimination. And we ourselves have repeatedly held that perjury prosecutions are permissible for false answers to questions following the grant of immunity."). See also *United States v. Wong*, 431 U.S. 174 (1977); *United States v. Mandujano*, 425 U.S. 564 (1976).

if the government attempts to coerce him into waiving the fifth amendment's constructive immunity provided under *Garrity*. Without that constructive immunity, the employee's fifth amendment privilege is no longer protected; the employee could incriminate himself by testifying because his testimony could be used against him in later criminal actions. The attempt to force the employee to waive *Garrity*'s constructive immunity and testify is an attempt to coerce self-incrimination and, therefore, violates the fifth amendment. Any punitive action taken against the employee for his refusal to waive fifth amendment protection is unconstitutional and will be redressed by the Court.

The Court of Appeals for the Fifth Circuit agreed with this reasoning in *Gulden v. McCorkle*.³³ After a bomb threat forced the evacuation of the Dallas Public Works Department, the Director ordered all department employees to submit to a polygraph examination about the incident. Employees were also instructed to sign waivers consenting to the test.³⁴ Two employees refused to take the polygraph test or sign waivers. They were later fired.

The district court found no evidence that the city had asked the employees to expressly waive their privilege to avoid self-incrimination. The waivers submitted to the employees merely asked for consent to the polygraph test. The waivers did not require the employees to waive their fifth amendment rights.

After reviewing the major Supreme Court decisions on the issue, the Fifth Circuit upheld the city's punitive action.³⁵ The court noted that a public employee cannot be compelled, through threats of dismissal, to waive the constructive immunity provided by *Garrity*.³⁶ However, a public employee may be required to answer "even potentially incriminating questions" so long as the government has not tried to coerce the employee into waiving fifth amendment protection.³⁷

In summary, as these cases emphasize, it is the compelled answer

33. 680 F.2d 1070 (5th Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983).

34. The Department waiver provided:

I, _____ of sound mind and body, age _____, do hereby submit to a polygraph examination given by _____, a certified polygraph examiner in the State of Texas. I understand that I have been ordered to take a polygraph examination by the Director of Public Works in conducting an administrative investigation for possible City of Dallas Code of Conduct violations. I hereby give my consent to _____ to conduct this polygraph examination concerning the subject matter previously discussed.

The polygraph firm's waiver provided:

I, _____, hereby consent and voluntarily agree to allow Baker-Holden-McElroy & Associates to administer a polygraph (lie detection) examination to me. I voluntarily consent to this examination of my own free will, and state that no duress, threats, or coercion have been placed on me to take this examination. I have not been promised anything of value, reward, or immunity to induce me to consent to this examination. I understand that I have the right to stop my polygraph examination at any time I desire.

Gulden, 680 F.2d at 1071 nn. 2, 3.

35. *Id.* at 1076.

36. *Id.* at 1073-74.

37. *Id.* at 1074.

in combination with the compelled waiver of immunity that creates the Hobson's choice for the employee. It is a discharge predicated on the employee's refusal to waive immunity which is forbidden . . . , not a discharge based on refusal to answer where there is no demand by the employer of the relinquishment of the constitutional right.³⁸

The employees argued that once they claimed their fifth amendment privilege, the city had to make an affirmative offer of immunity before it could require a polygraph test. They claimed that because the city failed to offer them immunity, participation in the polygraph tests would have operated as a waiver of immunity. The court rejected this argument.³⁹

[The plaintiffs'] theory that an affirmative tender of immunity was mandated by the holdings of *Lefkowitz I* and *II*, *Sanitation Men* and *Gardner* finds no support in those cases. It was rather the explicit demand by the employer of the waiver of immunity on penalty of job loss that created the constitutional infirmity. An employee who is compelled to answer questions (but who is not compelled to waive immunity) is protected by *Garrity* from subsequent use of those answers in a criminal prosecution. It is the very fact that the testimony was compelled which prevents its use in subsequent proceedings, not any affirmative tender of immunity. . . . There was no requirement of surrender here. Failure to tender immunity was simply not the equivalent of an impermissible compelled waiver of immunity.⁴⁰

The court expressed doubt that an affirmative duty to advise an employee of immunity could be found in any Supreme Court authority. However, the court declined to speculate in this case beyond finding that no such duty existed at the early stages in the investigation when the polygraph tests were requested.⁴¹

The remedy of a public employee faced with loss of employment for his

38. *Id.* (emphasis in original).

39. *Id.* at 1074-75.

40. *Id.* at 1075.

41. *Id.* at 1075-76. Other courts have interpreted *Gardner* and *Sanitation Men* in the same manner as the Fifth Circuit in *Gulden*. These courts support the view that the use of coercion to obtain a waiver of immunity transforms a legitimate government attempt to obtain an accounting of its employees' actions into an impermissible violation of the privilege against self-incrimination. Thus, in the absence of an attempt to coerce a waiver, a government may use threats of dismissal to force a public employee to testify about his duties and may dismiss the employee if he refuses to respond. See *United States v. Shamy*, 656 F.2d 951, 959 (4th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982); *Diebold v. Civil Serv. Comm'n*, 611 F.2d 697, 701 (8th Cir. 1979).

Some courts have interpreted *Gardner* and *Sanitation Men* to require a government to inform its employees that their statements will not be used against them in later criminal proceedings before the government may use threats of dismissal to force employees to testify. *Devine v. Goodstein*, 680 F.2d 243, 246 (D.C. Cir. 1982); *United States v. Devitt*, 499 F.2d 135, 141 (7th

refusal to testify therefore appears to depend upon what the government asks him to do. If the government asks the employee to answer questions narrowly tailored and directly related to his duties, on threat of dismissal if he refuses, then the government may dismiss him for failing to respond. Under *Garrity*, the fifth amendment would have provided the employee with constructive immunity had he testified, thus preventing any self-incrimination. Because that protection is available, the employee has no remedy for his dismissal. If, however, the government asks the employee to waive immunity, a constitutional violation occurs. The employee may not be discharged for refusing to waive that immunity.

If the President's military advisers are viewed as civilian employees of the federal government, they should have the protection outlined above. Thus, an adviser who testifies in the face of threats of removal from office, or worse, is protected from the use of his testimony in any subsequent criminal action against him. The coerced nature of the testimony provides the adviser with constructive immunity under *Garrity*.

If the President merely orders the advisers to answer questions narrowly tailored and directly related to their duties, his action is constitutional; the advisers must testify or risk punitive action. Again, *Garrity* would prohibit the use of their testimony against them, preventing any self-incrimination. If the advisers refuse to testify, they are subject to punitive action and no constitutional violation will occur. However, a presidential order to testify and waive immunity will violate the fifth amendment. Any punitive action directed toward the advisers for their refusal to waive immunity will be unconstitutional and can be remedied in court. Thus, the President's action appears unconstitutional only in this latter instance.

Constitutional Claims Asserted by Military Personnel

The above analysis determined the scope of fifth amendment protection

Cir. 1974), *cert. denied*, 421 U.S. 975 (1975); *Confederation of Police v. Conlisk*, 489 F.2d 891, 894 (7th Cir. 1973).

However, requiring public employers to affirmatively notify employees that their statements will not be used against them overlooks the fact that it is the very attempt by a government to use an employee's testimony against him that gives rise to *Garrity*'s protection. In *Garrity* the police officers were warned that (1) they could remain silent; (2) if they remained silent, they would be fired; and (3) if they spoke, their statements could be used against them. *Garrity*, 385 U.S. 493, 494 (1967). See *supra* text accompanying notes 5-15. The second and third warnings created the conflict necessary to invoke the fifth amendment's constructive immunity: a choice between job forfeiture and self-incrimination. Constructive immunity protected the policemen from self-incrimination, not because the government indicated their statements would not be used against them but because the government indeed warned that their testimony would be used against them. *Id.* at 496-98.

If the government had instead advised the officers that their statements would not be used against them, the choice between self-incrimination and job forfeiture would not have existed. Consequently, the constructive immunity provided by the fifth amendment would never have arisen. A duty to advise employees that their testimony cannot be used against them is logically inconsistent with the *Garrity* decision because fifth amendment constructive immunity can arise under *Garrity* only where the government intends to use an employee's testimony against him.

against coerced self-incrimination the President's military advisers should enjoy if they are viewed as civilian government employees. However, the advisers are members of the United States Armed Forces. Their military status creates two issues. First, if the advisers testify under coercion, will their military status deny them judicial enforcement of the constructive immunity available to civilians in such situations? Second, will their military status deny the advisers judicial protection against coerced waivers of that constructive immunity?

Federal courts have traditionally been reluctant to entertain claims brought by military personnel that entail review of military actions and use the doctrine of justiciability to prevent such review.⁴² Several policies have been cited. First, courts recognize the differences between the military and civilian society.⁴³ The military's need for strict discipline and uniformity often requires more control over the lives of military personnel than would be tolerated in civilian society. Second, some courts have cited judicial economy as a rationale for reluctant review of military decisions, noting the large number of lawsuits that would result from widespread review of claims by military personnel.⁴⁴ Third, courts recognize the technical nature of military affairs and are often reluctant to substitute their judgments for the decisions of persons trained in military matters.⁴⁵ And finally, courts recognize the importance of the military's mission—national defense.⁴⁶ As one court stated, the United States Armed Forces should concentrate on defending the country, rather than defending lawsuits.⁴⁷

Because of this reluctance to review military actions, courts have struggled to find a consistent policy to guide them in deciding when review of military actions is appropriate. The most structured and comprehensive test to date was created by the Court of Appeals for the Fifth Circuit in *Mindes v. Seaman*.⁴⁸ Air Force Captain Milbert Mindes received an adverse Officer Effectiveness Report that caused him to be separated from active duty. After exhausting all available military avenues in an attempt to void the report and return to active duty, Mindes filed suit in federal district court. The district court dismissed the suit with prejudice for lack of jurisdiction, and Mindes appealed.

The Fifth Circuit noted the policies against judicial review of military decisions and deliberately set out to collect and collate past decisions into a rational test for judicial review of military actions. The resulting test consists of two parts. First, a court should not review internal military affairs unless the plaintiff (1) alleges the violation of a constitutional right, applicable statute, or military regulation, and (2) shows that he has exhausted all available

42. See generally Note, *Judicial Review of Constitutional Claims Against the Military*, 84 COLUM. L. REV. 387 (1984).

43. *Id.* at 392-403.

44. *Mindes v. Seaman*, 453 F.2d 197, 199 (5th Cir. 1971).

45. See Note, *supra* note 42, at 392-403.

46. *Mindes*, 453 F.2d at 199.

47. *Poe v. Kuyk*, 448 F. Supp. 1231, 1234-35 (D. Del. 1978).

48. 453 F.2d 197 (5th Cir. 1971).

remedial procedures within the military.⁴⁹ If the plaintiff meets this burden, the court must then balance the policies favoring nonreview of military affairs to determine if judicial review is warranted.⁵⁰

The court provided four factors that should be weighed in the second step of the test to determine the reviewability of the plaintiff's claim. First, the nature and strength of the plaintiff's claim must be considered.⁵¹ Constitutional claims will carry more weight than claims based on a statute or military regulation. Likewise, some constitutional claims will carry more weight than others. For example, a claim involving personal liberty is stronger than a claim based on a haircut regulation.⁵² Claims that are obviously weak will strongly suggest declining to review.⁵³

Second, the court must consider the potential injury to the plaintiff if review is refused.⁵⁴ This factor is closely tied to the nature of the plaintiff's claim considered above. If potential harm to the plaintiff from a denial of review is substantial, this factor militates in favor of review.

Third, the type and degree of interference in military affairs that will result from judicial review must be considered.⁵⁵ Judicial review of any claim brought by military personnel will involve some interference in military matters. Thus, interference per se should not indicate declining to review. But if review will seriously impede the performance of vital military functions, judicial review is strongly discouraged.⁵⁶

Finally, a court must consider the extent to which military expertise is involved in the challenged action.⁵⁷ Courts should defer to the decisions of those well-trained in military affairs when matters such as promotions or orders directly related to specific military missions are challenged.⁵⁸

The court remanded *Mindes*' claim to be evaluated by the district court according to the new test.⁵⁹ To date, at least eight federal circuits have adopted the *Mindes* test.⁶⁰

49. *Id.* at 201.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 201-02.

59. *Id.* at 202.

60. See *Khalsa v. Weinberger*, 759 F.2d 1411 (9th Cir. 1985); *Gonzalez v. Department of the Army*, 718 F.2d 926 (9th Cir. 1983); *Rucker v. Secretary of the Army*, 702 F.2d 966 (11th Cir. 1983); *Nieszner v. Mark*, 684 F.2d 562 (8th Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983); *Lindenau v. Alexander*, 663 F.2d 68 (10th Cir. 1981); *Wallace v. Chappell*, 661 F.2d 729 (9th Cir. 1981), *rev'd on other grounds*, 462 U.S. 296 (1983); *NeSmith v. Fulton*, 615 F.2d 196 (5th Cir. 1980); *Schlanger v. United States*, 586 F.2d 667 (9th Cir. 1978), *cert. denied*, 441 U.S. 943 (1979); *West v. Brown*, 558 F.2d 757 (5th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978). *Contra*, *Dillard v. Brown*, 652 F.2d 316 (3d Cir. 1981) (expressly rejecting *Mindes* test); *Dilley v. Alexander*, 603 F.2d 914 (D.C. Cir. 1979) (rejecting preliminary screening of military cases for justiciability, which is the essence of the *Mindes* test). See generally Note, *supra* note 42.

*Application of the Mindes Test to the Fifth Amendment
Privilege Against Self-Incrimination*

The fifth amendment protection against coerced self-incrimination offered to civilian government employees should be available to military personnel if claims for such protection by service members are justiciable. Because the *Mindes* test represents the most structured and comprehensive analysis of military claims and is the test used in the majority of federal circuits, an application of that test to the present issue should provide the answer. The policies that must be weighed are the following: (1) the nature and strength of the military advisers' challenge to the President's order to testify; (2) the potential injury to these individuals if federal review is refused; (3) the type and degree of interference in military affairs that would result from judicial review of the President's action; and (4) the extent to which military expertise is involved in the President's decision.⁶¹

The first two factors may be considered together. The challenge to the President's order to testify is based on the constitutional privilege to avoid self-incrimination. Thus, the military advisers' claims begin at the higher end of the *Mindes* scale, above challenges to statutes or regulations.⁶² Furthermore, the fifth amendment privilege to avoid self-incrimination involves personal liberty; the possibility exists that the President's military advisers will be convicted of a criminal offense if they testify without immunity. According to *Mindes*, a constitutional claim involving personal liberty is one of the strongest that can be asserted.⁶³ This strongly suggests judicial review. The potential injury to the advisers, ranging from loss of employment to incarceration, also strongly suggests judicial review.

The degree of interference in military affairs that would result from judicial review of the President's action seems limited. Although the substance of the expected testimony may be military in nature, the act of requiring a service member to testify before congressional committees does not involve a vital military function; consequently, judicial review of the decision on constitutional grounds should not seriously impede any vital military function. A presidential decision to order testimony before congressional committees does not appear to involve military expertise, either. Such a decision would be primarily political in nature, unrelated to any specific objectives of the armed forces.⁶⁴

61. These factors, set forth in *Mindes*, 453 F.2d at 201-02, are applied to the present issue.

62. *Mindes*, 453 F.2d at 201.

63. *Id.* See *supra* text accompanying note 52.

64. The third and fourth *Mindes* factors—the degree of interference in military affairs and the necessity of military expertise—relate to judicial concerns of substituting court judgments for the decisions of persons specially trained in military affairs. Thus, these factors use the term “military” according to its common definition, referring to activities of the armed forces necessary to achieve the overall objective of national defense. Most actions deemed to be military in nature are personnel actions, such as promotion, demotion, training, and discipline of service members. See *Brown v. Glines*, 444 U.S. 348 (1980) (Air Force regulation requiring service members to seek command approval before circulating petitions held justified by the military's need to main-

A balance of these factors weighs heavily on the side of allowing review of the President's action. Thus, claims by service members based upon the fifth amendment privilege against self-incrimination should be justiciable. Military personnel should receive judicial enforcement of the fifth amendment's constructive immunity, preventing the use of coerced testimony in subsequent criminal actions against the advisers. Military personnel should also enjoy the fifth amendment prohibition against coerced waivers of this constructive immunity.

Conclusion

The United States Supreme Court has strictly protected the fifth amendment privilege to avoid self-incrimination, particularly when authorities attempt to coerce self-incrimination. If an individual is coerced into self-incrimination by threats of loss of employment or loss of economic benefits, his statements may not be used in any subsequent criminal prosecution against him. Thus, any individual who bows to threats of punishment and testifies without statutory immunity is provided with constructive immunity by the fifth amendment.

In the case of public employees, however, the government may constitutionally coerce testimony concerning official duties with threats of loss of employment so long as the government does not attempt also to coerce a waiver of immunity. The use of coercion provides the employee with fifth amendment constructive immunity, preventing the use of the coerced testimony against the employee in later criminal actions. Consequently, self-incrimination cannot occur, and the employee must testify or face removal from office. The government may not, however, coerce the employee into also waiving immunity from prosecution. Such action violates the employee's fifth amendment privilege because self-incrimination could occur; the employee's testimony could be used against him. Any punitive action taken against an employee who refuses to waive immunity is unconstitutional and will be remedied by the courts.

The President's military advisers should receive the protection outlined above, whether they are considered civilian government employees or military personnel. Although federal courts traditionally hesitate to entertain claims by service members for review of military actions, the policies favoring review outweigh those against it. The fifth amendment privilege to avoid self-incrimination is one of the strongest constitutional claims that can be made

tain loyalty, discipline, and morale); *Khalsa v. Weinberger*, 759 F.2d 1411 (9th Cir. 1985) (plaintiff's claim that Army appearance regulations violated his first amendment right to free exercise of religion was nonreviewable under *Mindes* test); *Nieszner v. Mark*, 684 F.2d 562 (8th Cir. 1982) (equal protection challenge to Air Force commissioning program's maximum age requirement nonreviewable under *Mindes*), *cert. denied*, 460 U.S. 1022 (1983); *Lindenau v. Alexander*, 663 F.2d 68 (10th Cir. 1981) (National Guard regulation preventing enlistment of single parents with custody of minor children upheld under *Mindes* test). Requiring military personnel to testify before congressional committees is not an action relating to any such specific military objective.

because it involves personal liberty. The potential injuries to the President's military advisers in the absence of judicial review are serious, ranging from loss of employment to incarceration. In contrast, a presidential order that military advisers testify before congressional committees is not an order relating to specific military objectives; it does not involve military expertise. Moreover, any interference into military matters that might result from judicial review of the President's order appears very limited. Accordingly, the President's military advisers should expect full protection of their fifth amendment rights in this situation.

Therefore, it is clear that the President may constitutionally use threats of punitive action to force his military advisers to answer questions specifically, directly, and narrowly related to their duties so long as he does not attempt to coerce the advisers into waiving immunity. If the President's military advisers give in to threats of punitive action and testify without statutory immunity, the fifth amendment will provide them with constructive immunity; their statements cannot be used in any criminal action against them.⁶⁵ If the advisers refuse to testify about their duties, the President can legally impose the threatened punitive action. If, however, the President attempts to coerce the advisers into waiving immunity, the President's action will be unconstitutional; and the advisers may seek judicial protection from any penalty.

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65. This conclusion brings about an interesting result: the President may have the ability to provide his advisers with immunity if he wishes to protect them from criminal prosecution. In the absence of statutory immunity provided by Congress, the President might provide the advisers with constructive immunity by threatening punitive action if they refuse to testify. If the advisers then testified under such coercion, *Garrity* should give rise to fifth amendment constructive immunity and prevent use of their testimony against them in later criminal proceedings. However, a host of additional issues beyond the scope of this note would be raised by the President's actual intent to immunize the advisers' testimony.